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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 218

THE UNITED STATES OF AMERICA, PETITIONER

vs.

YELLOW CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1950
CERTIORARI GRANTED OCTOBER 9, 1950

SUPREME COURT OF THE UNITED STATES

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No. 218

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"A" In The United States Court of Appeals for the Third Circuit

No. 9967

ROSE M. GUTMANN and ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY and JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

Appeal from the judgment of the District Court of the United States for the Eastern District of Pennsylvania at Nos. 7715 and 7857 respectively

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Appendices of appellant

Filed Aug. 1, 1949

[File endorsement omitted.]

1a *Appendix—Gutmann case*

In The United States District Court for the Eastern District of Pennsylvania

Civil Action No. 7715

ROSE M. GUTMANN and ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT

Docket entries

1947

Sept. 9, Complaint filed.

Sept. 9, Summons exit.

Sept. 16, Summons returned: "On Sept. 11, 1947 served" and filed.

2a Sept. 23, Motion for and Order of Court granting leave to defendant to bring in The United States as a Third-Party Defendant, filed.

Sept. 24, Third-Party Complaint, filed.

Sept. 24, Third-Party Summons exit.

Sept. 24, Answer filed.

Oct. 1, Third-Party Summons returned: "On Sept. 25, 1947 served U. S. Atty," and filed.

Oct. 3, Appearance of Gerald A. Gleeson, Esq. for Third-Party Defendant filed.

Dec. 4, Order to place case on the Jury Trial List filed.

Dec. 17, Stipulation of counsel extending time for filing answer to 3rd party complaint to Dec. 24, 1947 and Order of Court approving the same filed.

Dec. 24, Motion by Third-Party defendant to Dismiss, filed.

Dec. 24, Order to place case on Argument list, filed.

1948

Feb. 9, Argued sur motion of 3rd party defendant to dismiss, C. A. V.

Mar. 17, Plaintiff's interrogatories to defendant, filed.

Mar. 31, Order of Court denying motion to dismiss third party action filed. 4/1/48 Noted & Notice mailed.

Apr. 9, Answer of Third-party defendant, filed.

1948

Aug. 25, Motion for leave to serve amended complaint, filed.

Aug. 25, Order to place case on the Argument list, filed.

3a Sept. 13, Hearing sur motion for leave to serve Amended Complaint continued to Sept. 20, 1948.

Sept. 20, Hearing (Submitted on briefs) C. A. V.

Oct. 7, Order of Court denying motion for leave to serve amended complaint filed. 10/7/48 Noted & notice mailed.

Oct. 19, Trial (Kirkpatrick, J.) Witnesses sworn.

Oct. 20, Trial concluded.

Nov. 19, Testimony of Oct. 19 & 20, 1948, filed.

Dec. 10, Requests of United States for findings of fact and Conclusions of law, filed.

1949

Jan. 4, Opinion, Kirkpatrick, J. finding in favor of Rose M. Gutmann in $800 and in favor of Robert Henry Gutmann in the sum of $5000 and against Yellow Cab Co.; and in favor of Yellow Cab Co. and against United States in the sum of $2900 filed.

Jan. 4, Judgment in favor of Rose M. Gutmann in $800 and in favor of Robert Henry Gutmann in $5000 against Yellow Cab Co.; and in favor of Yellow Cab Co. against United States in $2900 filed. 1/5/49 Noted & Notice Mailed.

Jan. 11, Motion to set aside verdict and/or judgment of United States filed.

Feb. 7, Argued sur motion of U. S. to set aside verdict C. A. V.

Feb. 25, Opinion, Kirkpatrick, J. denying motion of U. S. to set aside verdict, filed.

4a Feb. 25, Notice of Appeal of Third-party defendant filed. 4/26/49 Copies to M. J. Meyer, Esq., S. A. Blank, Esq. and Jas. J. Leyden, Esq.

Feb. 25, Copy of Clerk's Notice to U. S. Court of Appeals filed.

May 19, Plaintiffs' requests for findings filed.

May 19, Defendants' requests for findings filed.

5a *Complaint*

(No. 7715)

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed, controlled, and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip and shoulder, and severe nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident plaintiff, Rose Gut-
6a mann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3,500.00.

(S) MILFORD J. MEYER,
1904 North American Bldg., Philadelphia 7, Penna.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia 7, Penna.
Attorneys for Plaintiffs.

7a *Motion to bring in third-party defendant*

(No. 7715)

Defendant, Yellow Cab Company, moves for leave to make the United States of America a party to this action and that there be served upon such third-party defendant summons and third-party Complaint as set forth in Exhibit "A" hereto attached.

(S) JAMES J. LEYDEN,
Attorney for Defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Order

And now this — day of September 1947, it appearing that the Complaint was served upon Yellow Cab Company on September 11, 1947, it is ordered that the clerk shall issue summons and third-party complaint to be served upon the said third-party defendant.

(S) GUY K. BARD, *J.*

8a *Exhibit "A"*

SUMMONS

To the above named Third-Party Defendant:

You are hereby summoned and required to serve upon Milford J. Meyer, Esquire, plaintiffs' attorney, whose address is 1904 North American Building, Philadelphia 7, Pennsylvania, and James J. Leyden, Esquire, attorney for Yellow Cab Company, defendant and third-party plaintiff, whose address is 1719 Packard Building, Philadelphia 2, Pennsylvania, an answer to the third-party complaint, copy of which is herewith served upon you, and an answer to the complaint of the plaintiff, copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

Dated:

[SEAL] ———— ————, *Clerk of Court.*

THIRD-PARTY COMPLAINT

1. Plaintiffs, Rose M. Gutmann and Robert Henry Gutmann, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B".

9a 2. At the time and place of the accident referred to in plaintiff's Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employe of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the de-

fendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Rose M. Gutmann and Robert Henry Gutmann.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia, 2, Pa.

10a *Exhibit "B"*

COMPLAINT

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed, controlled, and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip, and shoulder, and severe nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident, plaintiff, Rose Gutmann, has incurred various expenses for medical and
11a hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3,500.00.

MILFORD J. MEYER,
1904 North American Bldg., Philadelphia 7, Penna.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia 7, Penna.,
Attorneys for Plaintiffs.

12a *Third-party complaint*

(No. 7715)

1. Plaintiffs, Rose M. Gutmann and Robert Henry Gutmann, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B".

2. At the time and place of the accident referred to in plaintiffs' complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for
13a all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Rose M. Gutmann and Robert Henry Gutmann.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Exhibit "B"

COMPLAINT

1. Plaintiffs are citizens of the Commonwealth of Pennsylvania and defendant is a corporation created and existing under

the laws of Delaware. The matters in controversy, exclusive of interest and costs, each exceed the sum of $3,000.00.

2. On December 1, 1946, defendant owned, and by its agent and servant, possessed controlled and operated the taxicab involved in the accident hereinafter described.

3. On said date plaintiffs were passengers in said taxicab, which was proceeding south on Mascher Street and when it came to Ashdale Street it was so negligently and carelessly controlled and operated that it collided with a United States Mail truck, causing plaintiffs herein to be severely injured.

4. As a result thereof plaintiff, Rose Gutmann, sustained injuries to her knee, hip, and shoulder, and severe
14a nervous shock, which injuries have caused her great pain and suffering and have prevented her from attending to her usual duties; all of which may be permanent in character.

5. As a further result of said accident, plaintiff, Rose Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

6. Plaintiff, Robert Henry Gutmann, sustained a fracture of the left clavicle, injuries to his body and limbs and severe nervous shock, which injuries have caused him great pain and suffering and have prevented him from attending to his usual duties; all of which may be permanent in character.

7. As a further result of said accident plaintiff, Robert Henry Gutmann, has incurred various expenses for medical and hospital care and medicines, all of which may continue in the future.

Wherefore, there is claimed of the defendant on behalf of Robert Henry Gutmann, the sum of $10,000.00 and on behalf of Rose Gutmann, the sum of $3500.00.

MILFORD J. MEYER,
1904 North American Bldg., Philadelphia, 7, Pa.

SAMUEL A. BLANK,
1000 Liberty Trust Bldg., Philadelphia, 7, Penna.,
Attorneys for Plaintiffs.

15a *Answer*

(No. 7715)

I

FIRST DEFENSE.

1-2. Defendant, Yellow Cab Company, admits the averments contained in paragraphs 1 and 2 of the Complaint, except that it denies that the matters in controversy, exclusive of interest and costs, exceed the sum of $3,000.00.

3. Defendant, Yellow Cab Company, admits that plaintiffs were passengers in its taxicab which was south-bound on Mascher Street, and that at Ashdale Street defendant's taxicab and the United States Mail truck were in collision. Defendant denies that its taxicab was operated in a negligent and careless manner, but on the contrary avers that its taxicab was then and there operated in a careful, lawful and prudent manner with all due care under the circumstances.

4–7. In answer to the averments contained in paragraphs 4 to 7 inclusive of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

16a

II

SECOND DEFENSE

Defendant's taxicab was operated in a careful, lawful and prudent manner, and any injury or damage sustained by the plaintiffs was the result of the negligent and careless manner in which the aforesaid United States mail truck was operated.

(S) JAMES J. LEYDEN,
Attorney for Yellow Cab Company.

17a *Motion to dismiss*

(No. 7715)

The United States of America, third-party defendant above, by Gerald A. Gleeson, Esquire, United States Attorney for the Eastern District of Pennsylvania, attorney for the third-party defendant, moves the Court as follows:

(1) To dismiss as third-party defendant the United States of America, for the reason that the Federal Tort Claims Act under which the defendant attempts to join the United States of America as third-party defendant, does not authorize the maintenance of suits upon Derivative Claims.

(S) GERALD A. GLEESON,
United States Attorney.

18a *Order sur third-party defendant's motion to dismiss*

(No. 7715)

And now, to wit, this 31st day of March 1948, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *J.*

19a *Answer of third-party defendant*

(No. 7715)

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, in the above-listed matter, avers the following in answer to Third-Party Complaint in said matter:

First Defense: The allegation of paragraphs 1, 2 and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint.

Second Defense: The Complaint fails to state a claim against the Third-Party Defendant upon which relief can be granted.

Third Defense: Any injuries or damages which the Plaintiffs suffered were due to the negligent conduct of the Third-Party Plaintiff.

Wherefore, the Third-Party Defendant prays that the Third-Party Complaint be dismissed, with costs.

(S) GERALD A. GLEESON,
United States Attorney.

20a *Evidence on behalf of Yellow Cab Company, defendant*

(Nos. 7715 and 7857)

PHILADELPHIA, PA., *October 20, 1948.*

Before Hon. WILLIAM H. KIRKPATRICK, *J.*

Mr. LEYDEN. At this time, may it please the Court, I would like to offer into evidence paragraph 3 of the third-party complaint of the Yellow Cab Company, which has to do with the ownership, operation, and that the driver of the mail truck was acting within the course and scope of his employment, and the corresponding paragraph 3 of the Government's answer, which admits that allegation.

Paragraph 3 of the Third-Party Complaint of the Yellow Cab Company reads:

"3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 40th Street,
21a Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America."

The First Defense of the Answer of Third-party Defendant reads:

"First Defense: The allegations of paragraphs 1, 2, and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint."

Mr. LEYDEN. Is the cab driver here?

The COURT. Before you call him I will recess for a minute.

LOUIS HAIMOVITZ, having been duly sworn, was examined and testified as follows:

Mr. GAY. May it please the Court, since the third-party plaintiff is now carrying the ball, I would like to move for a directed verdict for the Government, because the Government takes the position it is not properly a party to this action, that the Court has no jurisdiction; and secondly because the complaint, the third-party complaint, does not allege any negligence on the part of the Government; assuming that it takes the position that if we are properly a party, the pleadings have not alleged that we were negligent, which it seems to us would be the only ground of recovery.

22a Mr. LEYDEN. May it please the Court, I don't think Your Honor has to hear me on the first point because that has already been decided once on a motion and briefs. If you want to hear me I will be glad to give you my reasoning in regard to it. But having passed——

The COURT. No; I think we can reserve it. I will overrule the motion now and I think we can reserve it.

Mr. LEYDEN. Now, on the second point, I am just a little bit shocked and greatly surprised. This question that counsel has now raised came up sometime ago and I wrote a letter to him to which to date I have never received a reply—I think you have it, Walter—which I will read to Your Honor, if I can find it here.

Under date of April 13, 1948, I wrote a letter to Mr. Walter Gay, thanking him for his letter of April 9th, and stated, I assume from our recent telephone conversation that you will have no objection to my amending the third-party complaint at the time of trial to aver that the mail truck was negligently operated. If I am in error will you kindly so advise me, so that I may take the necessary formal steps to conform the pleadings to what is evident to everybody?

There has been no secret about this thing from the very start.

23a The COURT. Do you move to amend?

Mr. LEYDEN. And I move now for leave to amend.

The COURT. I will allow the amendment.

Mr. GAY. Your Honor, I may say I had forgotten the letter, but I certainly thought he would ask the right to amend, and under the rules I assumed it would be granted, but I didn't want the——

The COURT. All right.

Mr. LEYDEN. Well, I thought the testimony would take care of that.

24a *Opinion sur pleadings and proof*

(Nos. 7715 and 7857)

Before KIRKPATRICK, *Ch. J.*

At the intersection of Ashdale and Mascher Streets, Philadelphia, Pennsylvania, on December 1, 1946, a mail truck going east on Ashdale ran into a taxicab going south on Mascher. The plaintiffs were passengers in the taxicab and were all injured in varying degrees.

The mail truck operator was negligent. He did not stop at the intersection, although a stop sign making Mascher a through street required him to do so. Even so, he might have avoided the collision by the exercise of due care. He had seen the taxi coming and knew that it was moving faster than he was, but drove on, apparently in a mistaken belief that he could get across the intersection first, at an increased speed and without changing his direction until the last minute.

The taxicab driver was also negligent, though in a lesser degree. By his own testimony, just before he entered the intersection he saw the mail truck coming about a hundred feet away on Ashdale Street. He could reasonably expect that it would stop but that did not relieve him of the duty of keeping an eye on
25a it. Heimburger v. Grundy, 348 Pa. 114. Actually his duty to do so was more absolute that that of the appellant in that case, because this driver was conveying paid passengers. O'Connell v. Quaker City Cab Co., 84 Pa. Super. 323. As a matter of fact he did not look or see the mail truck again until just before it struck him, at a point at least halfway across the intersection. He then did the best he could to escape the crash but it was too late.

I therefore find that both drivers were at fault and that the negligence of each was a substantial factor in causing the accident. My verdict is for each of the plaintiffs against the defendant, Yellow Cab Company, in the amounts stated below, and for the defendant third party plaintiff, Yellow Cab Company, against the third party defendant, the United States of America,

in the amount of $3,900, being one-half of the amounts for which the defendant is liable to the plaintiffs:

Rose M. Gutmann	$800.00
Robert Henry Gutmann	5,000.00
Calvin Howey	200.00
Justine A. Howey	1,800.00

I conclude that the defendants are liable as above and direct judgment accordingly.

26a *Judgment*

(No. 7715).

Before KIRKPATRICK, *J.*

And now, to wit: January 4th, 1949, in accordance with the Opinion of the Court, it is ordered that Judgment be and is hereby entered in favor of Plaintiff, Rose M. Gutmann in the sum of Eight Hundred and 00/100 ($800.00) Dollars, and in favor of Plaintiff, Robert Henry Gutmann, in the sum of Five Thousand and 00/100 ($5000.00) Dollars and against the Defendant and Third-Party Plaintiff, Yellow Cab Company, together with costs.

And it is further ordered that Judgment be and is hereby entered in favor of Defendant and Third-Party Plaintiff, Yellow Cab Company, and against the Third-Party Defendant, United States of America in the sum of Two Thousand Nine Hundred and 00/100 ($2,900.00) Dollars.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

27a *Motion to set aside verdict and/or judgment*

(Nos. 7715 and 7857)

And now, this — day of January, A. D., 1949, comes Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Third-Party Defendant in the above-listed cases, and moves the Court to set aside the verdict and/or judgment entered in said cases and in support thereof avers the following:

1. This Court has no jurisdiction over the United States of America, Third-Party Defendant herein.

2. The Complaint of Yellow Cab Company, Defendant and Third-Party Plaintiff, does not state a cause of action against the United States of America, Third-Party Defendant, on which this Court may grant relief.

(S) GERALD A. GLEESON,
United States Attorney,
Attorney for United States of America,
Third-Party Defendant.

28a *Opinion sur motion of third-party defendant to set aside verdict*

(No. 7715)

Before KIRKPATRICK, *Ch. J.*

The plaintiffs, passengers in a taxicab, were injured in a collision with a United States mail truck. They brought this action against the Yellow Cab Company, owner of the taxicab, which thereupon filed a third-party complaint against the United States, the purpose of which was to enforce its right of contribution. The Court denied a motion to dismiss the third-party complaint and the case proceeded to trial before the Court without a jury. The Court found the drivers of both vehicles negligent, assessed damages in the total amount of $7,800, and, in the third-party proceeding, found a verdict for the Yellow Cab Company against the United States, in the amount of $3,900, being one-half of the plaintiffs' recovery. The United States now moves to set aside the verdict against it.

The Tort Claims Act provides that suits under it shall be governed by the Federal Rules of Civil Procedure, with certain exceptions or modifications as to counterclaims. The third-party practice provided by Rule 14 is not one of the exceptions and it follows that such practice is permissible under the Tort
29a Claims Act, provided the third-party claim is to enforce a liability for which the United States has consented to be used under that Act.

The government argues that the Tort Claims Act does not contemplate or permit joinder of the United States with other defendants in a tort action. However, all that the government's argument upon this point, if accepted, establishes is that the government may not be joined as a co-defendant in a suit to recover damages from it and others for a joint tort. In the present action, as originally brought, there was no joinder. The plaintiffs sued only the Yellow Cab Company, alleging that their in-

juries were caused by its negligence and not suggesting a joint tort. The claim of the Yellow Cab Company for contribution, asserted in the third-party complaint, is in effect a separate action and could just as well have been brought as such.

The Tort Claims Act, Sec. 410 (a) gives the Court jurisdiction to hear "any claim * * * on account of personal injury or death caused by the negligent or wrongful act * * *" of employees of the government. Note that the statute does not say a "claim for damages on account of personal injury", but merely a "claim on account of personal injury". The right which the Yellow Cab Company asserts against the United States in this case stems from a personal injury caused in part at least by the negligent act of a government employee and, even by the strictest possible construction of the language of the statute, is a claim on account of such injury.

The third-party proceeding is based on the law of Pennsylvania, which is that one joint tortfeasor has " * * * a substantive legal right to contribution from his joint tort feasor * * *", as the result of a verdict against it. Fisher v. Diehl, 156 Pa. Sup. 476, 482. The Yellow Cab Company is seeking to hold the United States " * * * liable in respect of such claim(s) * * *" in the same manner, and to the same extent as a private individual under like circumstances * * *" Tort Claims Act, Sec. 410 (a).

30a

The government makes the further point that the complaint asks not for contribution but for indemnity and that it must be dismissed, first, because it fails to state facts supporting a cause of action for indemnity and, second, because, if it did, there is no right to proceed for indemnity outside the Tucker Act. The contention is without merit. The third part' complainant does indeed demand judgment against the United States " * * * for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs * * *" However, it sets forth the facts of the accident and then says "For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant." It thus states, in the alternative, a liability on the part of the United States for (a) all, or (b) part, of the plaintiffs' claim against the Yellow Cab Company. To hold that, because a claim based on an indemnity agreement can be spelled out of the complaint, it must be dismissed in spite of the fact that contribution is also asked for, would be directly in the fact of Continental Collieries

v. Shober, 130 Fed. 2d 631, 635, and a multitude of other decisions which hold that "* * * * there is no justifica-
31a tion for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim." The Court can sustain the third-party complaint as stating a good cause of action for contribution by disregarding as surplusage the part of the prayer which asks judgment for all of the plaintiffs' claims against the defendant and it is the duty of the Court to do so.

The motion is denied.

32a *Notice of appeal*

(No. 7715)

Notice is hereby given that United States of America, Third-Party Defendant, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Court dated February 25, 1949, denying the Motion of the United States of America, Third-Party Defendant, to set aside the verdict and/or judgment, in the above entitled case.

(S) GERALD A. GLEESON,
United States Attorney.

33a *Appendix—Howey case*

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 7857

CALVIN HOWEY and JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, (3RD-PARTY DEFT.)

Docket entries

1947

Oct. 27, Complaint filed.

Oct. 27, Summons exit.

Nov. 5, Appearance of James J. Leyden, Esq. for defendant filed.

Nov. 5, Motion to bring in Third Party defendant and Order of

1947

Court granting motion filed. 11–6–47 Noted & Notice mailed.

34a Nov. 5, Third party complaint filed.

Nov. 5, Third Party Summons exit.

Nov. 5, Answer of Yellow Cab Co. filed.

Nov. 14, Summons returned: "on Oct. 29, 1947 served" and filed.

Dec. 3, Third-Party Summons returned: "on Nov. 6, 1947, served" and filed.

Dec. 24, Appearance of Gerald A. Gleeson, Esq., for U. S. filed.

Dec. 31, Motion by U. S. to dismiss, filed.

Dec. 31, Order to place case on argument list filed.

1948

Feb. 9, Argued sur motion of 3rd party defendant to dismiss. C. A. V.

Mar. 25, Appearance of Meyer, Lasch, Hankin & Poul, Esqs. for plaintiff filed.

1948

Mar. 29, Order to place case on the Trial List filed.

Mar. 31, Order of Court denying motion to dismiss third-party complaint filed. 4/1/48 Noted & notice mailed.

Apr. 9, Answer of third-party defendant, filed.

Aug. 25, Plaintiff's motion for leave to serve amended complaint and affidavit in support thereof, filed.

Aug. 25, Order to place case on Argument List, filed.

Oct. 19, Trial (Kirkpatrick, J.) Witnesses sworn.

Oct. 20, Trial concluded.

Nov. 19, Testimony of Oct. 19 & 20, 1948, filed (#7715).

35a Dec. 10, Requests of United States for Findings of Fact and Conclusions of Law, filed. (See #7715.)

1949

Jan. 4, Opinion, Kirkpatrick, J. finding in favor of Calvin Howey in the sum of $200 and in favor of Justine A. Howey in the sum of $1800 against Yellow Cab Co.; and in favor of Yellow Cab Co. against United States in sum of $1000, filed. (#7715.)

Jan. 4, Judgment in favor of Calvin Howey in $200 and in favor of Justine A. Howey in $1800 against Yellow Cab Co.; and in favor of Yellow Cab Co. and against United States in sum of $1000 filed. 1/5/49 Noted and Notice Mailed.

Jan. 11, Motion to set aside verdict and for judgment by United States filed. (#7715.)

Feb. 7 Argued sur motion of U. S. to set aside verdict. C. A. V.

Feb. 23, Order of Court, Kirkpatrick, J. denying motion of U. S. to set aside verdict filed. Noted and Notice mailed 2/23/49.

1949

Apr. 25, Notice of Appeal of Third-party defendant filed. (April 26, 1949 copies to Meyer, Lasch, Hanken & Poul, Esqs. and James J. Leyden, Esq.)

Apr. 25, Copy of Clerk's notice to U. S. Court of Appeals filed.

May 19, Plaintiffs' requests for findings, filed. (See C. A. 7715.)

May 19, Defendant's requests for findings, filed. (See C. A. 7715.)

36a *Plaintiffs' complaint*

(No. 7857)

1. Plaintiffs are citizens of and resident in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1, 1946, Defendant owned, and by its servant, agent or employee, possessed, operated and controlled the taxicab involved in the occurrence hereinafter described.

5. On said date, plaintiffs were passengers for hire in said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causin severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justine A. Howey suffered
37a a complete fracture through the distal end of the right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia, he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily

injuries, which injuries have caused him great pain and suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries to Justine A. Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

38a 11. Wherefore plaintiff Calvin Howey claims of defendant the sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

(S) AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

39a *Motion to bring in third-party defendant*

(No. 7857)

Defendant, Yellow Cab Company, moves for leave to make the United States of America a party to this action and that there be served upon such third-party defendant summons and third-party Complaint as set forth in Exhibit "A" hereto attached.

(S) JAMES J. LEYDEN,
Attorney for Defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Order

And now, this 3rd day of November 1947, it appearing that the Complaint was served upon Yellow Cab Company on October 27, 1947, it is ordered that the clerk shall issue summons and third-party complaint to be served upon the said third-party defendant.

(S) MCGRANERY, *J.*

40a *Exhibit "A"*

SUMMONS

To the Above Named Third-Party Defendant:

You are hereby summoned and required to serve upon Augustus F. Daix, 3rd, Esquire, plaintiffs' attorney, whose address is 1034 Commercial Trust Building, Philadelphia 2, Pa., and James J.

Leyden, Esquire, attorney for Yellow Cab Company, defendant and third-party plaintiff, whose address is 1719 Packard Building, Philadelphia 2, Pa., an answer to the third-party complaint, copy of which is herewith served upon you, and an answer of the complaint of the plaintiff, copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so judgment by default will be taken against you for the relief demanded in the third-party complaint.

Dated:

[SEAL] ——, *Clerk of Court.*

THIRD-PARTY COMPLAINT

1. Plaintiffs, Calvin Howey and Justine A. Howey, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B."

41a 2. At the time and place of the accident referred to in plaintiffs' Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Calvin Howey and Justine A. Howey.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

42a *Exhibit "B"*

PLAINTIFFS' COMPLAINT

1. Plaintiffs are citizens of and residents in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1st, 1946, Defendant owned, and by its servant, agent, or employee, possessed, operated, and controlled the taxicab involved in the occurrence hereinafter described.

5. On said date, plaintiffs were passengers for hire in the said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causing severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justice A. Howey suffered a complete fracture through the distal end of the
43a right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia; he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily injuries, which injuries have caused him great pain and suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries to Justine A.
44a Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

11. Wherefore plaintiff Calvin Howey claims of defendant the sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

45a *Third-party complaint*

(No. 7857)

1. Plaintiffs, Calvin Howey and Justine A. Howey, have filed against defendant a complaint, copy of which is hereto attached as Exhibit "B."

2. At the time and place of the accident referred to in plaintiffs' Complaint, the plaintiffs were passengers in the taxicab of the defendant, Yellow Cab Company.

3. At the time of the collision referred to in the Complaint, the mail truck owned by the United States of America was being operated by one Paul Henry Stephens, 2125 North 30th Street, Philadelphia, Pennsylvania, who was then and there acting within the scope of his office or employment as an employee of the Post Office Department of the United States of America.

4. For any injury or damages which plaintiffs may have suffered, the third-party defendant is or may be liable to the defendant or to the plaintiffs for all or part of the plaintiffs' claim against defendant.

Wherefore, Yellow Cab Company demands judgment against the third-party defendant, United States of America, for
46a all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs, Calvin Howey and Justine A. Howey.

(S) JAMES J. LEYDEN,
Attorney for defendant,
Yellow Cab Company,
1719 Packard Building, Philadelphia 2, Pa.

Exhibit "B"

PLAINTIFFS' COMPLAINT

1. Plaintiffs are citizens of and residents in the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under the laws of the State of Delaware.

3. The matters in controversy herein, exclusive of interest and costs, exceed, with respect to each plaintiff, the sum of Three Thousand ($3,000.00) Dollars.

4. On December 1st, 1946, Defendant owned, and by its servant, agent, or employee, possessed, operated, and controlled the taxicab involved in the occurrence hereinafter described.

47a 5. On said date, plaintiffs were pasengers for hire in the said taxicab, which was proceeding in a southerly direction on Masher Street in the City of Philadelphia, and when

it arrived at the intersection of Mascher Street with Ashdale Street, it was so negligently and carelessly operated and controlled that it came into contact and collision with a United States Mail truck, causing severe injuries to both of said plaintiffs.

6. As a result thereof, plaintiff Justine A. Howey suffered a complete fracture through the distal end of the right fibula, contusions over the right parietal region, contusions over the right distal fibula, contusions and abrasions of the left knee, and a severe shock to her nervous system and other bodily injuries, which injuries have caused her great pain and suffering and have prevented her from attending to her usual and customary duties; her said hurts and injuries may be permanent in character.

7. As a further result of said occurrence plaintiff Justine A. Howey has incurred and may in the future incur, various expenses for medical and hospital care and medicines, in an effort to alleviate her said hurts and injuries.

8. Calvin Howey, one of the plaintiffs herein, sustained an extreme emotional upset and nervous shock, recurrent nosebleeds and tachycardia; he suffered an exacerbation and aggravation of a pre-existing irritable heart condition, and other severe bodily injuries, which injuries have caused him great pain and
48a suffering and have prevented him from attending to his usual occupational duties, all of which injuries may be permanent in character.

9. As a further result of said occurrence, plaintiff Calvin Howey has incurred and will incur in the future various expenses for medical care and medicines, and other expenses in an effort to alleviate his hurts and injuries.

10. As a result of the aforesaid injuries of Justine A. Howey, said Calvin Howey has been and in the future will be injuriously affected in his enjoyment of the society, companionship and services of his said wife.

11. Wherefore plaintiff Calvin Howey claims of defendant sum of $5,000.00 and plaintiff Justine A. Howey claims of defendant the sum of $15,000.00.

AUGUSTUS F. DAIX, 3rd,
Attorney for Plaintiffs.

49a *Answer of defendant, Yellow Cab Company*

(No. 7857)

I

FIRST DEFENSE

1–4. The averments in paragraphs 1, 2, and 4 of the Complaint are admitted. The averments contained in paragraph 3 of the Complaint are denied.

5. Defendant, Yellow Cab Company, admits that plaintiffs were passengers in its taxicab which was southbound on Mascher Street, and that at Ashdale Street defendant's taxicab and the United States mail truck were in collision. Defendant denies that its taxicab was operated in a negligent and careless manner, but on the contrary avers that its taxicab was then and there operated in a careful, lawful, and prudent manner with all due care under the circumstances.

6–10. In answer to the averments contained in paragraphs 6 to 10, inclusive, of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

50a II

SECOND DEFENSE

Defendant's taxicab was operated in a careful, lawful, and prudent manner and any injury or damage sustained by the plaintiffs was the result of the negligent and careless manner in which the aforesaid United States mail truck was operated.

(S) JAMES J. LEYDEN,
Attorney for Yellow Cab Company.

51a *Motion to dismiss*

(No. 7857)

The United States of America, third-party defendant above, by Gerald A. Gleeson, Esquire, United States Attorney for the Eastern District of Pennsylvania, attorney for the third-party defendant, moves the Court as follows:

(1) To dismiss as third-party defendant the United States of America for the reason that the Federal Tort Claims Act under which the defendant attempts to join the United States of America as third-party defendant, does not authorize the maintenance of suits upon Derivative Claims.

(S) GERALD A. GLEESON,
United States Attorney.

52a *Order sur third-party defendant's motion to dismiss*

(No. 7857)

And now, to wit, this 31st day of March 1948, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *J.*

53a *Answer of third-party defendant*

(No. 7857)

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, in the above-listed matter, avers the following in answer to Third-Party Complaint in said matter:

First Defense: The allegations of paragraphs 1, 2, and 3 of the Third-Party Complaint are admitted. The Third-Party Defendant denies each and every other allegation contained in said Third-Party Complaint.

Second Defense: The Complaint fails to state a claim against the Third-Party Defendant upon which relief can be granted.

Third Defense: Any injuries or damages which the Plaintiffs suffered were due to the negligent conduct of the Third-Party Plaintiff.

Wherefore, the Third-Party Defendant prays that the Third-Party Complaint be dismissed, with costs.

(S) GERALD A. GLEESON,
United States Attorney.

54a *Judgment*

(No. 7857)

Before KIRKPATRICK, *J.*

And now, to wit: January 4th, 1949, in accordance with the Opinion of the Court, it is ordered that Judgment be and is hereby entered in favor of Plaintiff Calvin Howey in the sum of Two Hundred and 00/100 ($200.00) Dollars, and in favor of Plaintiff Justine A. Howey in the sum of Eighteen Hundred and 00/100 ($1,800.00) Dollars, and against the Defendant and Third-Party-Plaintiff Yellow Cab Company, together with costs.

And it is further ordered that Judgment be and is hereby entered in favor of Defendant and Third-Party Plaintiff Yellow

Cab Company, and against the Third-Party Defendant, United States of America in the sum of One Thousand and 00/100 ($1,000.00) Dollars.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

55a *Order sur motion of third-party defendant to set aside verdict*

(No. 7857)

And now, to wit, this 24th day of February 1949, upon consideration of the foregoing motion, it is ordered that the same be and is hereby denied.

By the Court,

(S) KIRKPATRICK, *Ch. J.*

56a XI

Notice of appeal

(No. 7857)

Notice is hereby given that United States of America, Third-Party Defendant, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Court dated February 25, 1949, denying the Motion of United States of America, Third-Party Defendant, to set aside the verdict and/or judgment, in the above-entitled case.

(S) GERALD A. GLEESON,
United States Attorney.

57 27

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

MOTION FOR LEAVE TO BRIEF AND ARGUE TOGETHER APPEALS IN THE CASES OF ROSE M. GUTMANN ET AL. AND CALVIN HOWEY ET AL. V. YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, V. UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT

The Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania and attorney for the above-listed Appellant, respectfully presents:

1. On the 25th day of April, A. D., 1949, the United States of America, Third-Party Defendant, filed a Notice of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania, dismissing Petitioner's Motion to set aside the verdict entered in the cases of Rose M. Gutmann, et al., and Calvin Howey, et al. v. Yellow Cab Company, Defendant and Third-Party Plaintiff v. United States of America, Civil Action Nos. 7715 and 7857, respectively.

2. The said cases involve suits of the Plaintiffs against the Yellow Cab Company, for damages arising out of a collision between a mail truck of the United States Government and a cab of the Yellow Cab Company, Defendant and Third-Party Plaintiff. Said Yellow Cab Company joined the United States of America as Third-Party Defendant in said proceedings.

3. All of the Plaintiffs in these actions were passengers in the said cab and the circumstances having to do with the liability of the Defendant and Third-Party Defendant are the same as regards each of the Plaintiffs.

4. The said cases were tried together in the United States District Court for the Eastern District of Pennsylvania by mutual consent of all the parties involved.

5. The same questions are involved in both appeals and any discussion of any one question will be equally applicable to the parties involved in the appeals.

6. None of the parties involved in these appeals object to the granting of this Motion.

(S.) GERALD A. GLEESON,
United States Attorney.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

ORDER

And now, this 21st day of June A. D., 1949, upon motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and Attorney for the United States of America, Appellant in the above-listed cases, it is hereby

Ordered, adjudged and decreed that the cases of Rose M. Gutmann, et al. and Calvin Howey, et al. v. Yellow Cab Company,

defendant and Third-Party Plaintiff v. United States of America, Third-Party Defendant (Nos. 9967 and 9966, respectively), be jointly briefed and argued.

MARIS, *J.*

Endorsements: Motion to consolidate cases for briefing and argument and order granting motion. Received & filed June 21, 1949. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT APPELLANT

STIPULATION

It is hereby stipulated and agreed among Milford J. Meyer, attorney for the Plaintiffs, Schnader, Harrison, Segal and Lewis, attorneys for the Defendant and Third-Party Plaintiff, and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Third-Party Defendant, in the above-listed cases, as follows:

(a) That the time for furnishing a statement to the Appellees of the contents of the Appellant's appendix is hereby extended until June 24, 1949;

(b) That the time for filing the Appellant's brief is hereby extended until July 2, 1949; and

(c) That the time for filing the briefs of the Appellees herein is hereby extended until September 3, 1949.

(S.) MILFORD J. MEYER
Attorney for Plaintiffs.

(S.) JAMES J. LEYDEN,
Schnader, Harrison, Segal and Lewis,
Attorneys for Defendant and Third-Party Plaintiff.

(S.) GERALD A. GLEESON,
United States Attorney.
Attorney for the United States
of America, Third-Party Defendant.

Approved: Maris, *J.*

6/21/49.

Endorsements: Stipulation to extend time for filing statement of contents of appendix to June 24, 1949; time for filing appellant's brief to July 2, 1949, and time for appellees' brief to September 3, 1949. Received & filed June 21, 1949. Ida O. Creskoff, Clerk.

W. A. Gay (MM)

Files Nos. 29693 & 29783

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

MOTION FOR ADDITIONAL EXTENSION OF TIME

The Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and attorney for the above-listed Appellant, respectfully presents:

1. That on June 21, 1949, a Stipulation was entered into by the parties in the above-listed matter, providing an extension of time for the filing of Appellant's brief as of July 2, 1949.

2. That the aforesaid stipulating time for the filing of Appellant's brief as of July 2, 1949, was the result of inadvertent error of a typographical nature, it having been the intention of the stipulating parties to fix August 2, 1949, as the last date for filing Appellant's brief.

3. The said inadvertent error has been brought to the attention of all of the parties to the above-listed proceedings and as a result of discussion therewith and in view of the mutual conveniences involved, Movant requests the Court to authorize an extension of time for the filing of Appellant's brief until July 28, 1949.

4. None of the parties in the above-listed cases object to the granting of this Motion.

(S.) GERALD A. GLEESON,
United States Attorney.

W. A. Gay (MM)

Files Nos. 29693 & 29783

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY, HIS WIFE

vs.

YELLOW CAB COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

ORDER

AND NOW, this 28th day of June, A. D., 1949, upon Motion of GERALD A. GLEESON, United States Attorney for the Eastern District of Pennsylvania, and attorney for the United States of America, Appellant in the above-listed cases, it is

ORDERED, ADJUDGED and DECREED that the time for the filing of the Appellant's brief in the above-listed cases is hereby extended until July 28, 1949.

MARIS, *J.*

Endorsements: Motion to extend time for filing appellant's brief to July 28, 1949 and Order granting motion. Received & Filed Jun. 28, 1949. Ida O. Croskoff, Clerk.

W. A. Gay (MM)

Files Nos. 29693 & 29783

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

STIPULATION FOR FURTHER EXTENSION OF TIME FOR FILING APPELLANT'S BRIEF AND APPENDIX

It appearing to the undersigned that Appellant's Brief and Appendix are in the hands of the printer and that said printer will not be able to deliver the said Brief and Appendix to said Appellant before July 29, 1949, at best:

Now, therefore, it is stipulated and agreed among Milford J. Meyer, attorney for the plaintiffs; Schnader, Harrison, Segal and Lewis, attorneys for the defendant; and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, attorney for the United States of America, that the time for filing Appellant's Brief and Appendix be extended until August 1, 1949.

(S.) MILFORD J. MEYER,
(S.) JAMES J. LEYDEN,
Schnader, Harrison, Segal and Lewis.
(S.) GERALD A. GLEESON,
United States Attorney,
Attorney for the United States of America,
Third-Party Defendant-Appellant.

July 28, 1949.

Approved.

BIGGS,
Ch. Judge.

Endorsements: Stipulation to extend time for brief of United States of America to August 1, 1949, filed—Approved. Received & Filed Jul. 28, 1949. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

STIPULATION FOR EXTENSION OF TIME FOR FILING APPELLANT'S BRIEF

It appearing to the undersigned that the printer will be unable to complete appellee's brief before September 13, 1949;

Now, Therefore, it is stipulated and agreed among Milford J. Meyer, attorney for the plaintiffs; Schnader, Harrison, Segal and Lewis, attorneys for the defendant; and Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, attorney for the United States of America, that the time for filing appellee's brief be extended until September 13, 1949.

(S.) MILFORD J. MEYER,
(S.) JAMES J. LEYDEN, JR.,
Schnader, Harrison, Segal and Lewis.
(S.) GERALD A. GLEESON.

Approved: September 1, 1949.
KALODNER, *J.*

Endorsements: Stipulation for extension of time for filing appellee's brief to Sept. 13, 1949—Approved. Received & Filed Sep. 1, 1949. Ida O. Cieskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued December 6, 1949

Before BIGGS, *Chief Judge*, and O'CONNELL and KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed April 27, 1950

By BIGGS, *Chief Judge*.

There are two appeals at bar. They can be disposed of appropriately in one opinion. Two suits were brought in the court below because the Gutmanns and the Howeys, the original plaintiffs, riding together as passengers, were injured in a collision which took place in Philadelphia on December 1, 1946 between a taxicab operated by Yellow Cab Company, the original defendant and the third-party plaintiff, and a mail truck operated by an employee of the United States, the third-party defendant. The Gutmanns and the Howeys sued Yellow Cab Company in the two suits referred to, jurisdiction being based on diversity and requisite amount. Thereafter, Yellow Cab filed a third-party complaint in each suit seeking

to enforce contribution from the United States.[1] See Rule 14(a), FRCP.

The United States, as third-party defendant, filed a motion to dismiss each suit on the ground that the Federal Tort Claims Act[2] "does not authorize the maintenance of suits upon derivative claims." These motions were denied and the United States then filed answers. The cases were consolidated for trial and evidence was presented by the plaintiffs, the original defendant and by the third-party defendant. The court below found Yellow Cab Company and the United States both guilty of negligence,[3] gave judgments against Yellow Cab in favor of the Gutmanns in the amount of $5,800, in favor of the Howeys in the sum of $2,000, and ordered one-half of the respective amounts to be paid by the United States by way of contribution. The United States then moved to set aside the verdicts on the same ground theretofore asserted, viz., that the FTCA did not authorize "derivative" suits against the United States. The District Court decided that the third-party actions could be maintained[4] and overruled the motions. The United States has appealed.

The United States in its briefs and argument in this court has treated the questions involved as if they were those only of joinder, i. e., as if the issue were: Does the FTCA permit the United States to be joined with Yellow Cab Company as a party defendant? In the court below, however, at least by way of pleading, emphasis seems to have been laid by the United States on the question as to whether actions for contribution, such as those asserted here against the United States, can be maintained under the applicable Pennsylvania statute, 12 P. S. Pa. § 2081. We will discuss the cases in the first instance as if the primary issue were one of joinder and then endeavor to dispose of the questions presented by the pending actions treating them as, what they in reality are, suits for contribution.

The primary question on the joinder phase of the appeals can be phrased as follows: Did the FTCA authorize joinder of the United States with another party-defendant or did the Act only authorize suits brought against the United States as the sole or

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[1] In the third-party complaints Yellow Cab demands judgment against the United States "for all sums that may be adjudged against defendant, Yellow Cab Company, in favor of plaintiffs . . .".

[2] 28 U. S. C. (1946 ed.) Sections 921-946. Most of the provisions of what was the FTCA are now sown throughout revised Title 28. See "Table 1", an addendum to revised Title 28, United States Code, "Judiciary and Judicial Procedure", 28 U. S. C. A., as appears.

[3] The opinion was not reported for publication.

[4] The opinion was not reported for publication.

single defendant? Carefully balancing the language of the statute some courts have held that the United States may be joined with another defendant or defendants. See for example Englehardt v. United States (D. C. Md.) 69 F. Supp. 451. Subrogation against the United States also has been permitted. See United States v. Aetna Surety Co., 338 U. S. 366, referred to hereinafter, and the pertinent cases cited therein. Other courts have taken the view that the FTCA authorized suits against the United States only when it was the sole defendant, basing their conclusions in large part on legislative history. See Drummond v. United States (D. C. Va.) 78 F. Supp. 730 and Uarte v. United States (D. C. Cal.) 7 F. R. D. 705.[5]

At the time of the occurrence of the accident the provisions of revised Title 28, United States Code, were not in effect, the effective date of revised title being September 1, 1948. See Section 38 of the Act of June 25, 1948, c. 646, 62 Stat. 992. The complaint was filed in the Gutmann case (Civil Action No. 7715 in the court below) on September 9, 1947, and in the Howey case (Civil Action No. 7859 in the court below) on October 27, 1947. Judgments were entered in both cases in the court below on January 4, 1949, the adjudications therefore being made after the effective date of revised Title 28. Section 39 of the Act of June 25, 1948, provides that "The sections or parts . . . of . . . [the] Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." It appears that the FTCA, as amended, was repealed by the Act of June 25, 1948. See the schedule referred to in Section 39, 62 Stat. 1008. It would follow that if a loss of rights would occur if the provisions of revised Title 28 were to be applied, the provisions of the FTCA as they existed prior to the effective date of the revised title must be deemed to be governing. See note 6 cited to the text in Hoiness v. United States, 335 U. S. 297, 301. In United States v. Aetna Surety Co., 338 U. S. at p. 370, at note 5 cited to the text of Mr. Chief Justice Vinson's opinion, reference is made to what may be regarded properly as the key section of the FTCA, viz., Section 410(a), Section 931 of Title 28 U. S. C. (1946 ed.), and it is stated that "This section is now divided, and, with immaterial changes, appears in [revised Title] 28 U. S. C., Sections 1346(b) and 2674."

In the cited case the Supreme Court was considering the effect

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[5] On this general subject see the note and the collection of authorities therein, 1 A. L. R. 2d 222, 230, 239 *et seq.* See also 35 Georgetown Law Journal, 1; 56 Yale Law Review, 534 at 554 *et seq.* and 62 Harvard Law Review, 321 *et seq.*

of R. S. 3477, the "anti-assignment" statute, 31 U. S. C. A. Section 203, and held that an insurance company could bring an action under the FTCA in its own name against the United States upon a claim to which it had become subrogated by payment to an insured who would have been able to bring such an action. The issue with which we are concerned in the instant case was not precisely in focus in the Aetna Surety Co. decision. We state this because it seems to us possible that the language of Section 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA, 28 U. S. C. (1946 ed.) Section 931(a). We need not determine this question, however, for it is clear that the rights of the parties accrued before September 1, 1948; and, if the language of Section 1346(b) of revised Title 28 be narrower in scope, the instant cases must be determined under the FTCA as it existed prior to the date last stated. On the other hand if the words of Section 1346(b) do not effect any limitation of the rights of the parties we need not consider them here for it is clear that they work no enlargement. Moreover, the FTCA as it existed prior to September 1, 1948, must be deemed to give the true congressional intent in respect to the rights of parties under the FTCA prior to the effective date of revised Title 28. We therefore shall consider the law as it existed prior to revised Title 28 and thus decide the instant cases.

The proponents of the United States as the sole or single party point out that Section 410(a) [6] of the FTCA, now 28 U. S. C.

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[6] Section 410(a) was as follows:

"Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like

Sections 1346(b), 2402, and 2674, conferred exclusive jurisdiction upon United States district courts "sitting without a jury" to hear and determine claims "on account of personal injury" caused by the negligent act of an employee of the Government, and that this presupposes a trial with the United States as the sole defendant since the Seventh Amendment requires, unless waived, a jury trial for any other defendant. The proponents of the theory that the United States may be joined as a defendant argue that because Section 410 (a) provided that the Government should be liable "under circumstances where the United States if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act . . . occurred" and also that ". . . the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances . . .", Congress had made the rights and liabilities of the United States equivalent to those of a private litigant and such a waiver of immunity by the sovereign permits its joinder. In modern practice juries very frequently are waived in trials in United States district courts. Had a jury been insisted on by the private defendant in the instant case there was no valid reason why the trial judge and the jury respectively should not have determined the liability of the United States and that of the private defendant. Cf. Elkins v. Nobel, (D. C. N. Y.) 1 F. R. D. 357.

The United States asserts that since Section 410 (b) of the FTCA, now 28 U. S. C. Section 2676, provided that a judgment against the United States in a Section 410 (a) action should constitute a complete bar to any suit brought by the claimant against the employee of the Government whose negligence gave rise to the claim, the negligent government employee could not have been joined as a third-party defendant with the United States as a third-party defendant. Cf. Dickens v. Jackson (D. C. N. Y.) 71 F. Supp. 753. But this contention carries little weight respecting joinder or nonjoinder of the United States though as a practical matter it has served to eliminate government employees as defendants in most suits.

In some of the cases deciding in favor of non-joinder much is made of the fact that Section 412 of the FTCA, now 28 U. S. C. Sections 1291, 1504, 2110, provided an alternative appeal from a judgment of a United States district court either to the appropriate

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circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees."

court of appeals or to the Court of Claims of the United States. Section 412 provided, if the appeal was to the Court of Claims, that the notice of appeal, required by Rule 73, FRCP, should have endorsed upon it the written consent of all the appellees to the appeal as taken. Putting aside questions as to the power of Congress to have provided for an appeal from an Article III court to an Article IV court or to have conferred upon the Court of Claims of the United States in the terms of Section 412 ". . . the same powers and duties [respecting appeals] as those conferred on a . . . court of appeals", it can be cogently argued that since the United States can be the only defendant in a suit in the Court of Claims, it must have been the congressional intent that the United States should be the sole appellant or the sole appellee in a suit arising under the FTCA for otherwise the Court of Claims might have been compelled to deal with the rights and obligations of the United States as a defendant in conjunction with those of other defendants, a course theretofore prohibited to it. This argument has weight.[7] Cf. §§ 1504 and 2106 of revised Title 28, United States Code.

Section 420 provided a period of one year for bringing suit on account of personal injuries. Cf. 28 U. S. C. Section 2401(b), as amended. Many of the statutes of limitations of the States governing suits for personal injuries are of longer duration. In Pennsylvania the limitation upon suits for personal injuries is two years. See 12 P. S. Pa. § 34. It can be argued therefore that Congress did not intend to permit joinder because a private defendant might be kept in the suit while the United States was eliminated. Such a result would be somewhat anomalous but as was pointed out by Judge Yankwich in 9 F. R. D. at pp. 153-4, the FTCA was a statute of *creation*.

Section 422, now 28 U. S. C. Section 2678, provided for the payment of attorney's fees by the United States in the cases of successful litigants and prescribed criminal penalties for any attorney whose compensation exceeded 20% of the sum recovered under the FTCA. It is said that joinder of the United States with a private defendant would have rendered such a provision inoperable. This position is untenable.

There are other considerations advanced by Yellow Cab or in the decided cases, which require discussion. Section 411, now

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[7] No serious question of constitutionality can arise in the setting of the cases at bar. Cf. National Ins. Co. v. Tidewater Co., 337 U. S. 582. The appeal to the Court of Claims is a permissive one and the cases were brought here and not to the Court of Claims.

repealed in pertinent part,[8] provided expressly that the practice and procedure under the FTCA should be in accordance with the Federal Rules of Civil Procedure. This was a shotgun proviso, however, and though it is urged, as is the fact, that Rule 20 (a) authorizes joinder, we cannot find this very persuasive.

A cogent argument in favor of joinder, however, lies in the fact that while Section 421, now 28 U. S. C. Section 2680, set out twelve exemptions from the operation of the FTCA, not one of them prohibited joinder or made any reference to subrogation or contribution. Cf. Old Colony Ins. Co. v. United States (6 Cir.) 168 F. 2d 931.

Though the legislative history of the FTCA is inconclusive, it will be observed that the report of the Committee on the Judiciary of the House of Representatives dated November 26, 1945, H. Rept. 1287, 79th Cong., 1st Sess., accompanying H. R. 181, entitled "Tort Claims Against the United States", stated respecting Section 301 of that bill, substantially the equivalent in language of Section 410 of the FTCA, that "It is intended that the district courts in exercising jurisdiction . . . shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act . . . The bill therefore does not permit any person to be joined as a defendant with the United States . . ." It should be noted that S. Rept. 1400, the report of the Special Committee on the Reorganization of Congress, accompanying S. 2177, 79th Cong. 2d Sess. which became Public Law No. 601, the Legislative Organization Act, Title IV of which is the FTCA, contained no such statement. It may be argued with some plausibility, therefore, that the earlier intention of the members of the Judiciary Committee of the House of Representatives to eliminate joinder of the United States was not insisted upon. In referring to the Federal Tort Claims title of S. 2177, S. Rept. 1400 stated that this title was almost identical with that which was incorporated in H. R. 181, with the exception that the $10,000 limitation had been removed. The report said respecting Section 410 of the FTCA, which was the same as Section 301 of H. R. 181: "The trial will be without a jury as is now the case in suits under the Tucker Act. The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law, except that no punitive damages and

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[8] See Schedule of Laws Repealed, following Section 39 of the Act of June 25, 1948, revised Title 28, United States Code, "Judiciary and Judicial Procedure," 28 U. S. C. A. as appears. See also S. Rept. 1559, 80th Cong., 2d Sess., accompanying H. R. 3214, in which the view was taken that the provision contained in Section 411 relating to the Federal Rules of Civil Procedure was unnecessary.

no interest prior to judgment may be recovered." From the foregoing it may be concluded that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder and that the feature of the Tucker Act foremost in the mind of Congress was trial to the court without a jury.[9]

Emphasis may also properly be laid on the practice in admiralty under Section 3 of the Suits in Admiralty Act, 46 U. S. C. A. Section 743, where the language employed is very similar to that contained in Section 410 (a) of the FTCA.[10] There is no doubt that the United States can be impleaded by the respondent under

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[9] The argument of the United States respecting legislative history may be summed up as follows:

The Federal Tort Claims Act was included in Title IV Public Law No. 601, enacted by the 2nd Session of the 79th Congress. H. R. 7236, introduced in the 76th Congress 1st Sess., S. 2221 (passed by the Senate) and H R. 6463 introduced in the 77th Congress 2nd Sess., S. 1114 in the 78th Congress 1st Sess., and H. R. 181 in the 79th Congress are to some degree progenitors of the present Act. Section 403 of H. R. 6463 read as follows: "If the damage, loss, injury, or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." Section 403 of S. 1114 contained substantially the same language. The United States points out that when the FTCA was enacted the language expressly providing for joinder and contribution was omitted. This, it is contended, demonstrates that Congress did not intend that joinder should be made or contribution should be effected.

We do not find this argument persuasive though, of course, it carries some weight. We adhere to the view that if Congress had intended to prohibit joinder it would have done so by express mandate in the statute or by unmistakable legislative history in the reports accompanying the legislation as it was enacted. See the rules for the construction of legislative history as laid down by the Supreme Court of the United States by Mr. Justice Pitney in Duplex Co. v. Deering, 254 U. S. 443, 474-477.

[10] Section 743 in pertinent part read as follows:

"Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . ."

Admiralty Rule 56. See Brady v. Roosevelt S. S. Co., 317 U. S. 575, and Hust v. Moore-McCormack Lines, 328 U. S. 707.

Upon consideration of all of these factors we conclude that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants. Though there is room for doubt our conclusion expresses our best judgment in respect to the issue involved. But can contribution be exacted from the United States under the FTCA in the cases at bar? This is a closely allied question.

Contribution is a right arising under the substantive law of the States. The pertinent Pennsylvania statute, as we have said, is the Act of June 24, 1939, P. L. 1075, 12 P. S. Pa. § 2081, which provides that "Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them such liabilities are either all primary or all secondary." See Fisher v. Diehl, 156 Pa. Super. 476, 482, 40 A. 2d 912, 916, and Kravas v. Great Atlantic & Pacific Tea Co. (D. C. Pa.) 28 F. Supp. 66. The United States has been found equally guilty with Yellow Cab by the court below. It would follow that if the United States were a private party it would be primary liable as a joint tort-feasor and contribution could be enforced against it by Yellow Cab under the Pennsylvania statute cited. But could contribution from the sovereign to Yellow Cab fall within the purview of the FTCA? Did the waiver of immunity by the sovereign go so far? We think that it did.

The provisions of Section 410 (a) [11] seem conclusive in this connection for that section conferred exclusive jurisdiction upon the United States district courts to render judgment on any claim against the United States "on account of personal injury . . .". Note that the jurisdiction of the United States district courts was not limited to the adjudication of *claims for damages*. The word "claimant" used in the statute was employed to designate any person who might assert the claim and was *not* limited to one who

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[11] Cf. the pertinent provisions of Section 1346(b) of revised Title 28, United States Code, as follows: ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cf. note 6, *supra*.

had sustained damage to his property or injury to his person. In other words a "claimant" in the eye of the statute was any one who had a claim against the United States *on account* of personal injury or damage to property. Broader phrases or words more likely to embrace liability generally are difficult to imagine. A joint tort-feasor would have a claim on account of personal injury as would a subrogee. This point was settled by the decision of the Supreme Court in United States v. Aetna Surety Co., *supra*. It would seem to have been the intention of Congress to put the United States on a precise parity with the private litigant in suits cognizable under the FTCA. See Moore's Federal Practice, 2nd ed., Vol. 3, pp. 2730-2739.

The judgments in the instant cases are cast in proper form for it will be observed that at each number (Civil Action No. 7715 in the case of the Gutmanns, and Civil Action No. 7857 in the case of the Howeys) the judgments were first found against Yellow Cab and the court then ordered that judgments be entered in favor of Yellow Cab and against the United States for one-half of the amounts. The Pennsylvania law and practice do not require the existence of a joint judgment before a claim for contribution can be enforced against the joint tort-feasor.[12] The Pennsylvania third-party practice is within the purview of Rule 14(a), FRCP. Separate suits could have been filed against the United States by Yellow Cab, the United States being the sole defendant, and judgments of contribution could thus have been obtained by Yellow Cab. The principle of United States v. Sherwood, 312 U. S. 584, 587-8, arising under the Tucker Act, would be inapplicable even by way of analogy for such judgments would have been obtained in suits in which the United States was the sole defendant. In the instant cases the learned trial judge could have terminated the proceedings after judgments had been rendered in favor of the Gutmanns and the Howeys against Yellow Cab, and then could have proceeded to give separate trials to the United States on the issue of contribution. Surely the stricture of the Sherwood case, even if it were deemed to be applicable to cases involving joinder of the United States arising under the FTCA, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge. Cf. United States v. Aetna Surety Co., *supra*.

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[12] Note that in the case of Fisher v. Diehl, 156 Pa. Super. 476, 40 A. 2d 912, the wife could not sue the husband for negligent personal injuries. Therefore, a joint judgment could not have been obtained by her.

It is urged that somehow and in some way there might be a difference in quality, and therefore in result, in a trial in which the liability of two joint tort-feasors is adjudicated as compared to a trial in which the right of one tort-feasor to exact contribution from another is determined even if the trials were to be proceeded with in the same court and before the same judge. This argument would seem to be based on the proposition that the liability of the United States would somehow be enlarged, or it would be placed in an invidious position because its blameworthiness is determined in a suit with that of another defendant. Such an argument seems divorced from reality. But in any event the short answer to it is that the doctrine of the Sherwood case is inapplicable by way of analogy to the instant cases for it was apparently the intention of Congress to cause the United States to stand in equality with the private litigant in suits arising under the FTCA.

The judgments of the court below will be affirmed.

Judge O'Connell heard the argument and participated in the consideration of these appeals but died before the opinion was filed.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9967

ROSE M. GUTMANN AND ROBERT HENRY GUTMANN

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: BIGGS, *Chief Judge*, and KALODNER, *Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

April 27, 1950.

Endorsements: Judgment affirming judgment of District Court. Received & Filed Apr. 27, 1950. Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 9966

CALVIN HOWEY AND JUSTINE A. HOWEY

vs.

YELLOW CAB COMPANY

vs.

UNITED STATES OF AMERICA, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania

PRESENT: BIGGS, *Chief Judge*, and KALODNER, *Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pensylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

April 27, 1950.

Endorsements: Judgment affirming judgment of District Court. Received & Filed Apr. 27, 1950. Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania.

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Rose M. Gutmann and Robert Henry Gutmann, Plaintiffs and Yellow Cab Company, Defendant and Third-Party Plaintiff, (Appellee)—Civil Action No. 7715—a judgment was entered in the District Court on February 25, 1949, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 27, 1950.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 16th day of May in the year of our Lord one thousand nine hundred and fifty.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit.

Costs—

Clerk's Fee	$.....
Printing	$.....
.....	$.....
Total	$.....

Endorsed: Civil Action No. 7715, No. 9967, Rose M. Gutmann and Robert Henry Gutmann vs. Yellow Cab Company vs. United

States of America, Appellant. Copy Mandate, received & filed May 16, 1950. Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania.

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Calvin Howey and Justine A. Howey, his wife, Plaintiffs and Yellow Cab Company, Defendant and Third-Party Plaintiff, (Appellee) and United States of America, Third-Party Defendant, (Appellant)—Civil Action No. 7857—a judgment was entered in the District Court on February 25, 1949, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 27, 1950.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 16th day of May in the year of our Lord one thousand nine hundred and fifty.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit.

Costs—

Clerk's Fee ..... $.....
Printing ..... $.....
..... $.....

Total $.....

Civil Action 7857, No. 9966, Calvin Howey and Justine A. Howey vs. Yellow Cab Company vs. United States of America, Appellant. Copy Mandate. Received & filed May 16, 1950. Ida O. Creskoff, Clerk.

I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices of Appellant, and proceedings in this court in the cases of Rose M. Gutmann and Robert Henry Gutmann vs. Yellow Cab Company vs. United States of America, appellant, No. 9967 and Calvin Howey and Justine A. Howey vs. Yellow Cab Company vs. United States of America, appellant, No. 9966, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 15th day of June in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the United States the one hundred and seventy-fourth.

[SEAL.]

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1950 892201 744

80 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 204, Capital Transit Co. vs United States of America.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1950